

We Want Tough Arguments

When top advocates stand up for Uncle Sam and detainees, America gets the best law.

By Theodore B. Olson
and Neal Katyal

The war on terror transcends political parties and will increasingly call for the best argumentation and insight from our nation's finest advocates. That's one of many reasons why the recent remarks of Cully Stimson, the Pentagon official in charge of detainee affairs, were particularly unfortunate. Stimson, who singled out law firms by name (and their corporate clients) for representing detainees at Guantánamo Bay, not only attacked those lawyers but also managed to attack the legal profession as a whole.

The ethos of the bar is built on the idea that lawyers will represent both the popular and the unpopular, so that everyone has access to justice. Despite the horrible Sept. 11, 2001, attacks, this is still proudly held as a basic tenet of our profession.

While the two of us have been on opposite sides of legal cases involving Guantánamo Bay detainees, we share a deep respect for the advocates, for the government and the detainees, who have dedicated themselves to helping our nation clarify its approach to detainees. Maligning those lawyers undercuts the important task they are undertaking and insults our system of justice.

When Stimson uttered his remarks, he echoed what others have said about Guantánamo-detainee lawyers, both officially—the chief prosecutor for the military tribunals at Guantánamo has said it was “ironic” that Boeing, a major defense contractor, would permit its outside law firms to represent detainees—and unofficially—in that some of these lawyers have been tarred as unpatriotic.

THE BEST FOR ALL PARTIES

The well-deserved criticism of Stimson's remarks has thus far not encompassed another disturbing trend: the vilification of government lawyers involved in the war on terror. Some star law school graduates have recently been warned that going to the Justice Department to work on terrorism cases or terrorism

policy might harm their long-term careers. Some individuals have taken to calling former Assistant Attorney General Jack Goldsmith, now a Harvard law professor, a war criminal for the advice he gave the government about detention policy. Others have sought to block Assistant Attorney General Peter Keisler from a D.C. Circuit judgeship in part because he personally argued a Guantánamo case in a federal appeals court. These personal attacks have a corrosive effect on the practice of law and on the ability of the government to get the most thoughtful legal advice.

With the war on terror, which unfortunately may go on for generations, America doesn't have any margin for error. The legal issues that surround this war are enormously intricate and don't lend themselves to sloganeering-based solutions. When government officials are called “war criminals” and when public-interest lawyers are called “terrorist huggers,” it not only cheapens the discourse, it scrambles the dialogue. The best solutions to these difficult problems will emerge only when the best advocates, backed by weighty resources, bring their talents to bear. And the heavy work of creating solutions for these complicated issues can only move forward when the name-calling ceases.

THIS IS REAL PATRIOTISM

An American patriot, John Adams, once defended a group of British soldiers who were accused of killing Americans in what was dubbed the Boston massacre. No one else wanted to take their case, but Adams believed that everyone deserved a fair trial. He and his law practice were threatened, but Adams stood strong. Although he was later elected president, Adams maintained that his defense of the British soldiers was “one of the best pieces of service I ever rendered my country.”

Working as an attorney for the government or on behalf of a detainee pro bono doesn't make an individual a hero, nor does it insulate the individual from criticism. But such criticism would be more constructive if it focused on the merits of the particular position being argued rather than personally on the advocate. If lawyers are going to be attacked in such vicious

terms for trying to help, the best ones won't lend their talents to the cause. The solutions will invariably be less firm. And the courts and, ultimately, the public will suffer because the best arguments aren't being made.

One of the wisest things the administration did after Sept. 11 was to permit lawyers to do their jobs in defending detainees. From the enormously talented judge advocates general who directly represented Guantánamo detainees to the hundreds of private practitioners who took on individual cases, they have

upheld our best principles by providing a vigorous defense. Patriotism is believing that the American system, not whim and insult, will reach the right results.

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